

## **LAST WILL AND TESTAMENT**

*(Q) What is a Last Will and Testament?*

(A) A Last Will and Testament is the legal document which controls the disposition of your property at death and may provide for guardianship for your children after your death. A will is not effective until death. As long as you are living, your will has no effect and no property or rights to property are transferred by it.

*(Q) Can my Last Will and Testament be changed?*

(A) Yes. Changes to a will are made by drafting a new will and destroying the old one, or by adding a "codicil." A codicil is a legal document that must be signed and executed in the same manner as your will. *NEVER MAKE ANY CHANGES TO YOUR WILL* without consulting an attorney. Changes on the face of your original will may make it invalid.

*(Q) What is my legal residence?*

(A) Your legal residence is the state in which you have your true, fixed and permanent home and to which, if you are temporarily absent, you intend to return. Voting, paying taxes, owning property, motor vehicle registration and so on, are some indicators of one's legal resident of some state. You cannot be a citizen at large.

*(Q) Is my legal residence important with regard to my will?*

(A) Yes. Your legal residence may affect where your will is probated and the amount of state inheritance or estate tax that may be paid at death.

*(Q) What is my estate?*

(A) Your estate consists of all of your property and personal belongings you own or are entitled to possess at the time of your death. This includes real and personal property, cash, savings and checking accounts, stocks, bonds, real estate, automobiles, etc. Although the proceeds of insurance policies may be considered part of your estate in some states, a will does not change the designated beneficiaries of an insurance policy. The proceeds of an insurance policy, although part of your estate for tax purposes in North Carolina, will normally pass to the primary or secondary beneficiary designated on the face of the policy.

*(Q) To whom should I leave my estate?*

(A) A person who receives property through a will is known as a *beneficiary*. You may leave all of your property to one beneficiary, or you may wish to divide your estate among several persons. You may state in your will that several different items of property or sums of

money shall go to different persons. In any event, you should decide on at least two levels of beneficiaries: *PRIMARY BENEFICIARIES* -- those who will inherit your property upon your death; and *SECONDARY BENEFICIARIES* -- those who will inherit your property in the event the primary beneficiaries die before you. You may even want to select a third-level beneficiary in the event that both the primary and secondary beneficiaries die before you.

*(Q) May a person dispose of his property in any way he chooses?*

(A) Almost, but not quite. For example, in some states, a married person cannot completely exclude a spouse. Generally, you are free to give your property to whomever you desire. However, most states have laws that entitle spouses to at least part of the other spouse's estate. This *statutory share* ranges generally from one-third to one-half of the other spouse's estate. Some states, such as Louisiana, also provide shares of the estate to children of the decedent. Other provisions of the law may control insurance proceeds and jointly owned property. If you have questions concerning the statutory share law in your home state, you should ask a legal assistance attorney.

*(Q) Should I name a guardian for my children in my will?*

(A) Yes. A guardian should be named in a will to ensure that the children and their estates are cared for in the event that both parents should die. Your guardian should be chosen with extreme care, as this person will be charged with the duty of raising your children and managing their legal affairs. Do not automatically assume that your parents or any other relative will be a suitable guardian. Such factors as the age of the guardian, age of the children, religion, social status, economics, and relation of the proposed guardian to the children, if any, should be considered in making your decision. Additionally, a substitute guardian should be chosen with the same care as the primary guardian just in case the primary guardian cannot serve in that capacity.

*(Q) I want my parents to be the secondary guardians of our children and my spouse disagrees. Do we have to agree on the appointment of a secondary guardian?*

(A) It depends. The guardianship provision is normally effective when both parents die at or about the same time. As an example, if the husband's will nominates his parents and the wife's nominates her parents and both husband and wife die at or about the same time, then the court will have to decide who is the proper party to be the children's guardian. That will cause undue hardship on all parties concerned as well as considerable unnecessary expense, a large part of which your estate will have to pay. On the other hand, if the parties dies several years apart from one another, the guardianship clause in the second will to be probated is the only one that would be effective, so there would really be no conflict between the two wills if different secondary guardians were chosen by the husband and wife.

*(Q) What is an executor?*

(A) An executor is the person who will manage and settle your estate according to the will. You should also consider naming a substitute executor in the event that the named executor is unable or unwilling to act as the executor of your estate. By the wording of your will, you can require that your executor or substitute executor be required to post bond or other security, or you can waive this requirement, thereby saving expense to your estate. The choice is yours.

*(Q) What if I want to set up a trust?*

(A) The resources are available in Legal Assistance Offices to permit the drafting of simple trust agreements. Consult with your legal assistance attorney for further details.

*(Q) How long is a will valid?*

(A) A properly drawn and executed will remains valid until it is changed or revoked. However, changes in circumstances after a will has been made, such as tax laws, marriage, birth of children or even a substantial change in the nature or amount of a person's estate, can affect whether your will is still adequate or whether your property will still pass in the manner you chose. All changes in circumstances require a careful analysis and reconsideration of the provisions of a will and may make it wise to change the will, with the help of your legal assistance attorney.

*(Q) Does a will increase probate expense?*

(A) No. It usually costs less to administer an estate when a person leaves a will than when there is no will. A properly drafted will may reduce the expense of administration in a number of ways. Provisions can be placed in wills that take full advantage of the federal and state tax laws. Drawing a will can avoid the expense of posting bond or appointing a guardian for your children. A will can save money for you and your family if it is properly drafted.

*(Q) How large an estate is necessary to justify a will?*

(A) Everyone who owns any real or personal property should have a will regardless of the present amount of his estate. Your estate grows daily in value through the repayment of mortgages, appreciation of real estate, stocks and other securities, inheritances from relatives and other factors.

*(Q) What happens when you don't make a will?*

(A) When a person dies without a will (or dies *intestate*, as the law calls it) the property of the deceased is distributed according to a formula fixed by law. In other words, if you don't make a will, you don't have any say as to how your property will be divided. Take the

case of a North Carolina resident dying without a will. If this person dies leaving children, the surviving spouse would share the estate with the children. With no will, the surviving spouse receives the first \$30,000 of personal property and half of the remaining estate when there is only one child; if there were two or more children, then the widow or widower would get one-third of the remainder and the children two-thirds of the same. Now usually a person would prefer that all of his estate, if it is not large, go to the surviving spouse. If there are any children under 18, the property cannot be delivered to them and a guardian must be appointed for them. A guardian will require considerable expense and could create legal problems that might have been avoided with a will. Most important for mothers and fathers, however, is not the disposition of their property after their death but rather the proper care and custody of their minor children. Grandparents, other family members and godparents do not automatically receive custody of children who do not have surviving parent. Your will should specify the individual, as well as an alternate, you would like to designate as the guardian of your children. This decision on your part will be of great assistance to the court in determining who will receive the custody of your children.

*(Q) What happens to property held in the names of both husband and wife as joint tenants with the rights of survivorship?*

(A) Joint bank accounts and real property held in the names of both husband and wife with right of survivorship usually pass to the survivor by law and not by the terms of the deceased's will. There are many cases, however, in which it is not to your advantage to hold property in this manner.

*(Q) Is a life insurance program a substitute for a will?*

(A) No. Life insurance is only one kind of property, which a person may own. If a life insurance policy is payable to an individual, the will of the insured has no effect on the proceeds. If the policy is payable to the estate of the insured, the payment of the proceeds may be directed by a will. The careful person will have a lawyer and life insurance counselor work together on a life insurance program, as one important aspect of estate planning.

*(Q) What if I still have questions regarding my will?*

(A) Ask them while your legal assistance attorney is preparing your will. Be sure that you convey accurately your wishes for the distribution of your property.